

THE INDIAN LAW REPORTS, LUCKNOW SERIES.

FULL BENCH.

Before Mr. Justice Wazir Hasan, Chief Judge, Mr. Justice Muhammad Raza and Mr. Justice Bisheshwar Nath Srivastava.

BAIJNATH PRASAD AND ANOTHER (PLAINTIFFS-APPELLANTS)
v. GAJADHAR BAKHISH AND ANOTHER (DEFENDANTS-RESPONDANTS).*

1930
March, 20.

Oudh Rent Act (XXII of 1886), section 127—Suit against a person not in actual possession, maintainability of—Section 127, Oudh Rent Act, object and application of—Defendant in actual possession in years before the institution of suit but not at the time of the institution of suit, section 127, applicability of.

The words employed by the Legislature in enacting section 127 of the Oudh Rent Act, 1886, sufficiently clearly indicate the intention that a suit under that section would lie only against a person in actual possession of the lands in respect of which the relief may be claimed, and not against a person who is in symbolical or constructive possession of it. *Badri Bishal Singh v. Ram Autar* (1), and *Mahadeo Singh v. Pudai Singh* (2), approved.

Where a suit is laid under section 127 against a defendant who was previously in actual possession of the land in suit but was not in actual possession on the date of the institution of the suit no relief can be given under that section for it is the state of facts on the date of the institution of the suit which should determine the applicability or otherwise of the provisions of section 127.

* Second Rent Appeal No. 48 of 1929, against the decree of Pandit Raghubar Dayal Shukla, First Additional District Judge, Lucknow, at Bara Banki dated the 22nd of July, 1929, confirming the decree of S. Muhammad Raza, Assistant Collector, 1st class of Bara Banki, dated the 18th of April, 1929.

(1) (1926) 3 O.W.N., 870.

(2) (1928) 12 Revenue Decisions, 490.

1930

BAIJNATH
PRASAD
v.
GAJADHAR
BAKHSI.

The case was originally heard by a Bench consisting of STUART, C. J. and RAZA, J., who referred it to a Full Bench of three Judges for decision. The referring order of the Bench is as follows:—

STUART, C. J. and RAZA, J. :—The facts of the suit out of which this appeal arises are these: The plaintiffs Baijnath Prasad and Jagdish Prasad are purchasers of a certain mahal in village called Amouli Kiratpur. The defendants Gajadhar Bakhsh and Mohan Singh were the proprietors of the rights purchased by the plaintiffs. The plaintiffs obtained possession over the mahal on the 27th of February, 1926. The defendants on the findings of fact retained certain plots without the consent of the plaintiffs. In the year 1828 the plaintiffs proceeded to sue the defendants under the provisions of section 127 of Act XXII of 1886 for rent payable for land occupied without the consent of the landlord and for ejectment. The courts below have dismissed the suit considering that the Rent Courts had no jurisdiction according to the decision of the late Mr. Justice GOKARAN NATH MISRA in *Badri Bishal Singh v. Ram Autar* (1). The view taken by the learned Judge was that the Rent Courts have only jurisdiction to take action under section 127 against persons in actual possession and that the section has no application to persons in constructive possession. The decision in question does not, however, fully cover the facts of the present case. The suit was brought for rent payable for land occupied without the consent of the landlord in respect of the years 1333, 13334, 13335 and *kharif* 1336 *Fasli*. The finding of fact is that during the years 1333, 1334, and 1335 *Fasli* the defendants-respondents actually cultivated the land themselves. They were in actual possession and not in constructive possession. But in the year 1336 *Fasli* they sub-let the plots to sub-tenants and were in constructive possession and not in actual possession. We consider the case is of

(1) (1926) 3 O.W.N., 370.

sufficient importance to justify a reference to a Full Bench under the provisions of section 14 of the Oudh Courts Act, 1925, and we desire the opinion of the Bench upon the following points :—

(1) Does the Bench accept the view of the late Mr. Justice GOKARAN NATH MISRA in *Badri Bishal Singh v. Ram Autar* (1). If they do not accept that view of the law, what is their view?

(2) If the principle be accepted that the provisions of section 127 only apply to the case of a person in actual possession and not in constructive possession, would those provisions have application in case of a person who during a portion of the period in suit has been in actual possession, but who at the time of the institution of the suit was only in constructive possession?

The reference will be made accordingly.

Mr. *Bishambhar Nath Srivastava*, holding brief of Mr. *H. D. Chandra*, for the appellants.

Mr. *Zahur Ahmad*, for the respondents.

HASAN, C. J., RAZA and SRIVASTAVA, JJ. :—This is a reference to a Full Bench by a Divisional Bench of this Court for answers to two questions :—

(1) Is the view laid down in *Badri Bishal Singh v. Autar* (1), decided by the late Mr. Justice GOKARAN NATH MISRA correct?

GOKARAMAN NATH MISRA correct?

(2) If it is correct in principle, whether it is applicable to the facts of this case ?

We have not literally reproduced the question referred to the Full Bench for decision but that is the substance of those questions.

The facts are as follows :—

The plaintiffs-appellants purchased at an auction sale a mahal in a village called Amouli Kiratpur. This

1930

BALINATH
PRASADv.
GAJADHAR
BAKSHI.Stuart, C.J.,
and
Raza J.

was done in execution of a decree on the foot of a mortgage against the defendants. Formal possession of the property purchased was delivered to the plaintiffs on the 27th of February, 1926, and for the purposes of this suit it is agreed that the plaintiffs obtained possession of every thing to which they were entitled except 7 plots of land, over which the defendants retained possession in spite of delivery of possession to the plaintiffs. The defendants not only retained possession of those plots of land on the date of the delivery of possession but they continued the same possession up to the end of the year 1335 *Fasli*. In *kharif* 1336 *Fasli*, however, they sub-let it to a person who is now in actual possession of those lands but he is not a party to the litigation, out of which this reference arises.

In this state of facts the suit, out of which this matter arises, has been laid by the plaintiffs-appellants under section 127 of the Oudh Rent Act, 1886, for a decree for rent for the years 1333, 1334, 1335 and *kharif* 1336 *Fasli* against the defendants-respondents and also for the relief of ejectment. The courts below have dismissed the suit on the sole ground that the provisions of section 127 of the Oudh Rent Act are inapplicable to this case for the simple reason that on the date of the suit the defendants were not in actual possession of the land for which the rent is claimed. The courts below have followed the decision of the late Mr. Justice GOKARAN NATH MISRA already referred to and, as we have stated before, one of the questions in the case is as to whether that decision is sound in principle or not. We are of opinion that it is.

Section 127 of the Oudh Rent Act, 1886, is as follows :—

- “(1) A person taking or retaining possession of land without being entitled to such possession may, at the option of the person en-

titled to eject him as a trespasser, be treated as a tenant, and shall thereupon be liable for the rent of that land payable in the previous year, at such rate as the court may determine to be fair and equitable, but he shall not in respect of that land, have any of the statutory privileges conferred by this Act.

“(2) When a court passes a decree for arrears of rent under sub-section (1) read with clause (2) of section 108, it shall, on the application of the plaintiff, also pass a decree for the ejection of the defendant from the land.

It is agreed and we think rightly that a suit of the nature contemplated by the provisions of section 127 would ordinarily lie in a civil court in the form of a suit for ejection against a trespasser and for mesne profits. It follows that the provisions of the aforementioned section are exception to the general law and it further follows that they should be strictly construed. It seems to us that a view contrary to that taken by Mr. Justice GOKARAN NATH MISRA in the case mentioned above would lead to anomalous results. If the contrary view were permitted it would follow that a suit under section 127 would lie both against a person who is in actual possession (and there is no dispute as to that) and also against a person who is in constructive possession as is contended for by the plaintiffs-appellants' learned advocate in respect of the liability for mesne profits of the lands of the plaintiffs in possession of the defendants constructively and in possession of the sub-tenant actually. This result could not have been intended by the Legislature. As pointed in the judgment of our late colleague Mr. Justice GOKARAN NATH MISRA the words employed by the Legislature in enacting section 127 sufficiently clearly indicate the intention that a suit under that section would

1930

RAMNATH
PRASAD
v.
GAJADHAR
BAHSHI.

Stuart, G.J.,
and
Raza J.

1980

BALNATH
PRASAD
v.
GAJADHAR
BAKSH.

Stuart, C.J.,
and
Raza J.

lie only against a person in actual possession of the lands in respect of which the relief may be claimed. The words are "taking or retaining possession" and "be treated as a tenant." The words "taking possession" in their literal sense indicate taking actual possession as opposed to obtaining possession constructively. Similarly the words "retaining possession" connote a physical contact with the land and not symbolical. The words "treated as a tenant" again, according to our judgment, indicate a more close relation of the person in possession with the land than a symbolical connection or the right to collect rent. The principle which underlies the decision of our late brother, Justice GOKARAN NATH MISRA, has been accepted by the Board of Revenue of these Provinces as correct in *Mahadeo Singh v. Pudai Singh* (1), and we do not see compelling reason to make us deviate from the view taken in that case. On the contrary as stated above, we find several reasons in favour of the same view.

It was argued that there is no reason even on the construction which we have placed on the provisions of section 127 of the Oudh Rent Act, 1886, to reject the plaintiffs' claim for rent for the years in which the defendants were in actual possession of the lands in question. *Prima facie* the argument is attractive but we think it is not sound. The phraseology of section 127 amply supports the view that the person in possession of land without being entitled to such possession is a trespasser in essence. The object of section 127 is to provide for an alternative remedy in favour of the owner of the land to treat such a person in possession not as a trespasser but as a tenant and sue him for rent accordingly instead of seeking relief in a civil court for ejectment and damages. The provisions therefore call upon the owner of the land to make an election between two rules of procedure and obviously the owner signifies his election to proceed under section 127 by instituting a

(1) (1928) 12 Revenue Decisions, 490.

suit in accordance with the provisions of that section. Therefore the date of the institution of the suit is the date of election and it must in the very nature of things be state of facts on that date which should determine the applicability or otherwise of the provisions of section 127. If therefore the suit is laid as it is laid in the present case against a defendant who is not in actual possession on the date of the election it seems to us clear that it would logically follow that no relief can be given under that section.

Accordingly our answer to the first question is that we accept the view of law laid down in *Badri Bishal Singh v. Ram Autar* (1) and our answer to the second question is in the negative.

APPELLATE CIVIL.

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice E. M. Nanavutty.

LALJI AND ANOTHER (DEFENDANTS-APPELLANTS) v.
GHASI RAM (PLAINTIFF-RESPONDENT).*

1930
February,
18.

Indian Limitation Act (IX of 1908), sections 19 and 20 and articles 52 and 85—Supply of goods by one party and payments made by the other—Payments never in excess of the price of goods supplied—Suit for balance of price of goods supplied—Article 85, Limitation Act, applicability of—Payments towards general account—Interest, no agreement to pay—Sections 19 and 20, Limitation Act, applicability of—Indian Contract Act (IX of 1872), section 25, clause 3—Novation of Contract—Letter containing no definite promise to pay, whether can constitute a new contract within the meaning of section 25(3) of the Contract Act.

Where the dealings between the plaintiff and the defendants consisted of the supply of cloth by the plaintiff on the one hand and the payments of cash for the price of the said

* Second Civil Appeal No. 276 of 1929, against the decree of S. Asghar Hasan, District Judge of Hardoi, dated the 19th of July, 1929, reversing the decree of S. Abid Raza, Munsif of Bilgram, dated the 23rd of May, 1928.